UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ACTING SPECIAL COUNSEL, Petitioner, v. UNITED STATES CUSTOMS SERVICE, Respondent.	DOCKET NUMBER HQ12088610022 DATE: AUG 11 1986

BEFORE

Maria L. Johnson, Acting Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

On July 25, 1986, the Acting Special Counsel filed a request pursuant to 5 U.S.C. § 1208(c) for a 30-day extension of the previously granted stay of the removal of William J. Griffin from his position as Regional Commissioner of the U.S. Customs Service, Northeast Region.[1] The Acting Special Counsel states that he continues to have reasonable grounds to believe that Mr. Griffin's removal was proposed in reprisal for his disclosures of mismanagement to the Secretary of the Treasury, and thus violated 5 U.S.C. § 2302(b)(8).

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[1] A stay of the removal was ordered by Board Member Devaney on June 27, 1986, and was extended on July 10. See 5 U.S.C. § 1208(a) and (b).

The Acting Special Counsel states that additional time is required to complete his investigation. He asserts that, if it is necessary to file an action to enforce a subpoena, he may seek a further extension of 30 days.

The Board may extend any stay granted pursuant to 5 U.S.C. § 1208(b) for any length of time it considers appropriate after allowing the Special Counsel and the agency to comment. *See* 5 U.S.C. § 1208(c) and 5 C.F.R. § 1201.127(c)(3). The Special Counsel's and the agency's views have been considered.

I.

On February 28, 1980, Mr. Griffin retired from the position of Regional Commissioner of the Northeast Region. On that same day, he was reinstated in that position--a career appointee position in the Senior Executive Service. Thus, at the time of his proposed removal, he was a reemployed annuitant, serving at the will of the appointing authority. *See* 5 U.S.C. § 3323(b)(1)(Supp. 1986).

It is a prohibited personnel practice to take a "personnel action" against an employee in a "covered position" in reprisal for disclosure of information by the employee which he or she reasonably believes evidences a violation of law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety. *See* 5 U.S.C. §§ 2302(a)(1) and (2), and (b)(8). In light of Mr. Griffin's status as a reemployed annuitant, the parties were notified in the Order granting the first stay that there may be jurisdictional issues concerning whether the action

proposed against Mr. Griffin is a "personnel action" and whether his position is a "covered position."

The Acting Special Counsel has the burden of proving that the Board has jurisdiction to order a stay. *See Acting Special Counsel v. Department of the Treasury*, 6 M.S.P.R. 140 (1981). For the reasons below, we conclude that he has met his burden in this case.

The Acting Special Counsel asserts that Mr. Griffin's proposed termination falls within 5 U.S.C. § 2302(a)(2)(A)(iii)("an action under chapter 75 ... or other disciplinary or corrective action") and § 2302(a)(2)(A)(ix) ("a decision concerning pay..."). The agency argues that his termination cannot be a personnel action because a reemployed annuitant is subject to dismissal at the will of the appointing authority and, therefore, has no appeal rights to challenge his termination.

The fact that an action may not be appealable to the Board, however, is not determinative of whether a personnel action has occurred. There are many personnel actions--such as appointment, promotion, detail, and reinstatement--that are not appealable to the Board, and yet the Special Counsel has the authority to seek redress for an employee in a covered position if any of these actions are based on a prohibited personnel practice. *See* 5 U.S.C. § 2302(a)(2)(A).

The issue of whether an action is a personnel action focuses on the nature of the action at issue--not on the status of the employee who is the subject of the action. A termination of an

employee, regardless of whether he or she has an appeal right under chapter 75 of title 5, is a disciplinary action. *See Wren v. Department of the Army*, 2 M.S.P.R. 1 (1980), *aff'd*, 681 F.2d 867 (D.C. Cir. 1982); *Poorsina v. Merit Systems Protection Board*, 726 F.2d 507 (9th Cir. 1984)(probationary employee who alleges that he or she is being terminated in reprisal for whistleblowing has no right of appeal to the Board but may seek redress through the Office of Special Counsel).

We conclude that Mr. Griffin's termination is an "other disciplinary ... action" within the meaning of 5 U.S.C. § 2302(a)(2)(A)(iii).[2] Therefore, Mr. Griffin's termination is a "personnel action" under section 2302(a)(2)(A).

Mr. Griffin was a career appointee in the Senior Executive Service (SES). In 5 U.S.C. § 2302(a)(2)(B), a "covered position" is:

> ... any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include--
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> (i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
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> (ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

Technically, there are no "career appointee positions" in the SES. There are career reserved positions, which can be held

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[2] In light of this conclusion, it is unnecessary to decide whether a termination is also a "decision affecting pay" within the meaning of section 2302(a)(2)(A)(ix).

only by career appointees, and general positions, which can be held by career, non-career, limited emergency or limited term appointees. See 5 U.S.C. § 3132(a)(4) - (9). Thus, the phrase "career appointee position" in section 2302(a)(2)(B) could have two meanings. It could cover all career appointees, whether they occupy a career reserved position or a general position; or, it could cover only those career appointees in career reserved positions. However, if Congress had wanted to cover only those career appointees in career reserved positions, it could have done so by using the phrase "career reserved positions" since those positions can only be held by career appointees. Therefore, we conclude that a career appointee in a career reserved or a general position would be covered under section 2302(a)(2)(B).

The question remains whether a career appointee who is also a reemployed annuitant is covered under section 2302(a)(2)(B). Prior to 1956, the law provided that no annuitant could be reappointed to any Government position after attaining age 60 unless the appointing authority determined that he or she had special qualifications.[3] In 1956, the law was changed to provide that an annuitant could be reemployed in any position for which he was qualified and serve at the will of the appointing officer.[4] Prior to 1956, a reemployed annuitant's tenure was determined by the type of appointment he received; whereas after

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[3] See Civil Service Retirement Act--Amendment, Pub. L. 426, §2(b), 62 Stat. 48 (1948); 1948 U.S. Code Cong. & Ad. News 48.

[4] See Federal Executive Pay Act of 1956, ch. 804, §401 "Section 13(a)," 70 Stat. 757 (1956); 1956 U.S. Code Cong. & Ad. News 858.

1956, his tenure was dependent on the will of the appointing authority. Thus, while the change in the law in 1956 made it easier to reemploy an annuitant, it also provided that a reemployed annuitant would have no tenure rights.

Respondent's argument that Mr. Griffin is not in a covered position because he can be terminated at will is not persuasive. Whether an employee has tenure rights is not determinative of whether an employee is in a covered position under 5 U.S.C. § 2302(a)(2)(B). If respondent's argument were accepted, it would follow that the Special Counsel could not seek redress for reprisal for "whistleblowing" taken against a probationary employee in the competitive service, who is also terminable at will. However, the case law indicates otherwise. *See Wren*, 681 F.2d at 873; *Poorsina*, 726 F.2d at 509.

Nor could the Special Counsel seek to stay a personnel action of a non-preference eligible in the excepted service or of a preference eligible in the excepted service who has not completed one year of current continuous service. Those employees, similar to reemployed annuitants, may be removed without cause and are not entitled to procedural rights--including appeal rights to the Board. *See* 5 U.S.C. § 7511(a)(1). Yet, excepted service positions (except those that are specifically excluded) are covered positions. *See* 5 U.S.C. § 2302(a)(2)(B).

Respondent's argument would carve out exceptions from each category of competitive service, Senior Executive Service and excepted service positions, depending on whether the incumbent

could be removed without cause. Congress expressly excluded two types of positions, neither of which are relevant to the instant case.[5] As a general rule of statutory construction, expression of one exception indicates that no other exceptions apply. See 2A C. Sands, *Sutherland Statutory Construction* §§ 47.11, 47.25 (4th ed. 1973); *Hastie v. Department of Agriculture*, 24 M.S.P.R. 64, 73 (1984).

Because reemployed annuitants were not expressly excluded from operation of the statute, the Board will not read such an exclusion into the statute. Moreover, it would be inconsistent with the broad Congressional purpose behind the Civil Service Reform Act to encourage Federal employees to expose waste, fraud and abuse, to limit protection for such activity by narrowly construing the term "career appointee." See 5 U.S.C. § 2301(b)(9).

In *Special Counsel v. Peace Corps*, MSPB Docket Number HQ12088610008 (July 11, 1986), the Board held that the position of Country Director, the incumbent of which is appointed and may be removed by the President, was a policy-making, non-career position specifically excluded from Board jurisdiction under 5 U.S.C. § 2302(a)(2)(B)(i). The Board found that, because Congress saw fit to make Country Directors subject to appointment by the President and because of the actual duties of the position, the confidential, policy-making, or policy-advocating nature of the positions was evident. In the instant case, Mr.

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[5] While non-career, limited term and limited emergency appointees in the SES are also not covered, there is no exclusion for an annuitant who has been reinstated as a career appointee.

Griffin occupied a covered position for purposes of section 2302(a)(2)(B) ("a career appointee position in the Senior Executive Service"), even though his employment was subject to the will of the appointing authority.

We conclude that the tenure rights of the employee who occupies a covered position are irrelevant unless the employee involved is specifically excluded under 5 U.S.C. § 2302(a)(2)(B)(i) or (ii), as was the case in *Special Counsel v. Peace Corps.*

The agency offers *Davis v. Devine*, 736 F.2d 1108 (6th Cir. 1984), in support of its argument that a reemployed annuitant cannot occupy a "covered position." In *Davis*, however, the court simply held that a reemployed annuitant, who may be removed at will, could not be appointed as an administrative law judge (ALJ), who may be removed only for good cause under 5 U.S.C. § 7521. The purpose of section 7521, to grant ALJ's "independence and tenure rights that insulate them from possible agency influence or control," was inconsistent with the "at will" nature of employment of a reemployed annuitant. *See Davis*, 736 F.2d at 1111. In the instant case, however, the issue is not whether Mr. Griffin may be appointed, but rather whether the Special Counsel has the authority to seek redress for his removal, if based on a prohibited personnel practice. *Davis* provides no guidance on this issue.

We conclude that, because Mr. Griffin occupies a covered position and is about to suffer a personnel action, the Special Counsel has the authority to investigate and seek to stay his

termination if there are reasonable grounds to believe that a prohibited personnel practice occurred.[6]

II.

Section 1208(c) requires a stronger showing by the Special Counsel that there are reasonable grounds for his belief of the existence of prohibited discriminatory motives than sections 1208(a) or (b). *In re Kass*, 2 M.S.P.R. 79, 96-97 (1980). The Board has an "affirmative statutory duty to exercise independent judgment" in determining whether it concurs with the Special Counsel's conclusions regarding reasonable grounds. *Id.* at 97. Disputed factual issues are to be resolved in a manner most favorable to the Special Counsel's determination that there are reasonable grounds, so long as that determination is reasonable under all the circumstances. *Id.* at 96.

In its opposition to the request for an extension of the stay, the agency asserts that the Acting Special Counsel has not satisfied his evidentiary burden to have Mr. Griffin's termination further stayed. We disagree.

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[6] In his request for an extension of stay, the Acting Special Counsel argues that there is burgeoning case law which recognizes that an employer may not use the "at will" rule to shield violations of clearly mandated and well-defined public policy. *See Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 Harvard L. Rev. 1931 (1983). The argument continues that, if general notions of public policy would prohibit the discharge of an at will employee for whistleblowing that is not specifically protected by statute, then an at will employee who occupies a "covered position" cannot be discharged for whistleblowing specifically protected under 5 U.S.C. § 2302(b)(8). However, as the Acting Special Counsel acknowledges, the issue of the Board's jurisdiction in this case must be decided solely on the basis of whether the statutory requirements are satisfied. Therefore, this argument will not be considered.

On April 15, 1986, Mr. Griffin sent a letter to James A. Baker, III, Secretary of the Treasury, stating, among other things, his belief that there have been questionable promotions and transfers within the U.S. Customs Service. *See* Official File, Tab 1, Attachment 2. This disclosure of alleged mismanagement or abuse of authority is protected under 5 U.S.C. § 2302(b)(8).

The Inspector General (IG) of the Department of the Treasury conducted an inquiry and issued a report on May 28, 1986. In the report, the IG found that his inquiry did not disclose any improprieties of a type which would warrant an investigation by his office, but that there was an appearance of possible improper acts in the position classification and selection procedures within the Customs Service. *See* Official File, Tab 1, Attachment 5. The IG inquiry closed on Friday, May 30.

The Acting Special Counsel asserts that the Deputy Commissioner, Alfred R. De Angelus, stated that, when Commissioner William von Raab received a copy of Mr. Griffin's April 15 letter, Mr. von Raab reacted with consternation. Mr. von Raab allegedly stated to Mr. De Angelus: "What can I do with him. Now he's gone to the Secretary." Mr. Von Raab then allegedly asked Mr. De Angelus if Mr. Griffin could be removed. The Acting Special Counsel states that Mr. De Angelus then contacted the Chief Counsel's office and the IG's office, and was told that Mr. Griffin could not be removed until after the IG investigation was closed.

On Monday, June 2--the next working day after the IG's inquiry closed--Mr. von Raab had a telephone conversation with

Mr. Griffin. On June 3, Mr. von Raab sent Mr. Griffin a letter allegedly confirming that, in the June 2 conversation, Mr. Griffin stated that he decided to retire. *See* Official File, Tab 1, Attachment 6. On June 11, Mr. Griffin responded to Mr. von Raab that the June 3 letter did not accurately reflect the conversation. *See* Official File, Tab 1, Attachment 7. On June 17, Mr. von Raab wrote back to Griffin stating that, because Mr. Griffin did not intend to fulfill their agreement about retirement, he was being terminated. *See* Official File, Tab 5, Attachment 3.

The Acting Special Counsel asserts that, in the June 2 conversation, Mr. Griffin did not tender his retirement, but rather Mr. von Raab told Mr. Griffin that he was being terminated effective June 30, 1986. In support of his request for an extension of the stay pursuant to 5 U.S.C. § 1208(c), the Acting Special Counsel has submitted an affidavit of Mr. Griffin stating that Mr. von Raab told him that he (von Raab) wanted Mr. Griffin out by the end of June. *See* Official File, Tab 14, Motion for Extension of Stay, Attachment 2.

The agency disputes the Acting Special Counsel's description of the June 2 conversation between Mr. Griffin and Mr. von Raab. In an affidavit dated June 11, 1986, Mr. von Raab recounts his version of the conversation, i.e., that Mr. Griffin stated that he wanted to retire at the end of the year; that Mr. von Raab suggested that he might not want to wait until the end of the year so he could use his leave entitlements; that Mr. von Raab stated that he wanted someone else at Mr. Griffin's desk at the

end of June if he were going to retire at the end of the year; and that Mr. Griffin agreed to go into a leave status at the end of June. *See* Official File, Tab 12. According to Mr. von Raab, when Mr. Griffin did not abide by their understanding about his retirement, Mr. von Raab released him from his position as a reemployed annuitant.

The agency has also submitted an affidavit of Mr. De Angelus indicating that, on June 2, he had had a telephone conversation with Mr. Griffin during which Mr. Griffin indicated that he desired to retire after he attained 46 years of service (which was on August 1). *See* Official File, Tab 15, Attachment 5. According to Mr. De Angelus, he then informed Mr. von Raab that Mr. Griffin was thinking about retiring, but did not want to retire until he had attained 46 years of government service.

Where, as here, material facts are in dispute, the Board will interpret the disputed facts in a manner most favorable to a finding of reasonable grounds to believe that a prohibited personnel practice has been committed. *See Kass,* 2 M.S.P.R. at 96. Considering the assertion that Mr. von Raab inquired whether Mr. Griffin could be terminated for insubordination based on the April 15 letter to the Secretary of Treasury, the proximity in time between the close of the IG's inquiry and the conversation in which Mr. Griffin allegedly "retired," and Mr. Griffin's description of the June 3 conversation, we find there is a clear

inference that Mr. Griffin's removal was taken in reprisal for protected disclosures.[7]

Therefore, we concur with the Acting Special Counsel's determination that there are reasonable grounds to believe that Mr. Griffin's removal was the result of reprisal for his protected disclosures to the Secretary of the Treasury.

Accordingly, an extension of the stay pursuant to 5 U.S.C. § 1208(c) is hereby GRANTED.

It is further ORDERED that:

(1) The terms and conditions of the stay issued on July 10, 1986, are extended to and including September 10, 1986.

(2) Within 5 working days of this Order, the United States Customs Service shall submit a verified report to the Board explaining the facts and circumstances surrounding compliance with this Order.

(3) The Acting Special Counsel shall file with the Board and serve on the United States Customs Service any additional information and arguments which he wishes the Board to consider

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[7] In addition, the Acting Special Counsel asserts that Stephen Dougherty, Executive Assistant to Mr. von Raab, stated that, on June 2, 1986, Mr. von Raab expressed concern about whether Mr. Griffin was effectively managing the Northeast Region. He could not remember Mr. von Raab commenting on any management problems prior to April 15. The Acting Special Counsel further asserts that he could find no evidence of any instances where Mr. Griffin fell short of his obligations as Regional Commissioner or failed to follow Mr. von Raab's policies. Although the agency offers an explanation concerning the context in which that concern was raised and asserts that there were, in fact, management problems occasioned by Mr. Griffin's absences from work, an inference may be drawn that this concern was raised at that time because of the April 15 letter.

on any petition for a further extension of the stay under 5 U.S.C. § 1208(c) on or before August 29, 1986.

(4) Any information which the United States Customs Service wishes the Board to consider in response to any request by the Acting Special Counsel for a further extension of the stay under section 1208(c) must be received by the Board's Office of the Clerk on or before September 4.

FOR THE BOARD:

Maria L. Johnson
Acting Chairman

Dennis M. Devaney
Member